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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1935.

No. [redacted] 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, A CORPORATION, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, DECEASED, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

OTIS F. GLENN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
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Of Counsel.

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ESTATE OF ELVIRA J. PARKS, DECEASED, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Illinois, by direction of the Comptroller of the Currency, respectfully prays that a writ of certiorari issue to review the judgment and decree of the Appellate Court of the First District of the State of Illinois rendered in the above case on December 27, 1935 (R. 20-24), reported in 283 Ill. App. 95.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, instituted proceedings in the Probate Court of Cook County, Illinois, on September 1, 1933 (R. 10) to enforce collection of an assessment in the sum of $1,200.00 on national bank stock owned by the respondents, Philip W. Huston and Frank M. Pray, as Executors of the Estate of Elvira J. Parks, deceased. The Probate Court denied the claim of the petitioner (R. 4), and upon appeal to the Circuit Court of Cook County, Illinois, the case was tried *de novo* and without formal pleadings, in accordance with the Illinois practice. Judgment was entered in the Circuit Court disallowing the claim of the petitioner as against the undistributed assets of the estate inventoried within one year from the date of granting of letters testamentary, but allowing said claim as to assets not inventoried within the year (R. 7). On appeal to the Appellate Court, First District, State of Illinois, the judgment of the Circuit Court was affirmed (R. 17, 24). Petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20).

II.

THE FACTS.

The facts as stipulated by the parties (R. 9-11) are substantially as follows:

On March 30, 1931, the Comptroller of the Currency of the United States declared the Austin National Bank to be insolvent, and thereupon closed said bank. On April 6, 1931, the Comptroller of the Currency appointed M. J. Pufahl as Receiver of said bank (R. 9).

On May 21, 1931, the Comptroller of the Currency made an assessment upon all the stockholders of said bank equal

to 100 per cent of the par value of the stock of said bank owned by each of said stockholders, including an assessment against the respondents, Philip W. Huston and Frank M. Pray, as Executors of the Last Will and Testament of Elvira J. Parks, in the amount of $1,200.00, said assessment being in the sum of $100.00 per share on twelve shares of the capital stock of said bank (R. 9).

The Comptroller of the Currency made a demand upon the respondents for the payment of the assessment, as aforesaid, together with interest. Upon the refusal of the respondents to pay said assessment, these proceedings to enforce the assessment were instituted (R. 10).

Elvira J. Parks died March 20, 1928, and at the time of her death she was the owner of twelve shares of capital stock of the Austin National Bank. Letters of Administration were issued by the Probate Court of Cook County, Illinois, to Philip W. Huston and Frank M. Pray on *May 17, 1928,* in the administration proceeding pending therein, entitled "In the matter of the Estate of Elvira J. Parks, deceased". An Inventory and Supplemental Inventory were filed in the Probate Court within one year after the date of issuance of Letters Testamentary.

It will be noted that this Inventory had already been filed (R. 10) approximately two years before the assessment was levied by the Comptroller. However, notwithstanding such Inventory, there has been no final distribution and the estate is still open (R. 10).

An additional stipulation (R. 26) provides:

> "It is hereby stipulated by and between the petitioner M. J. Pufahl as Receiver of the Austin National Bank, Chicago by Otis F. Glenn, his attorney, and respondents, Philip W. Huston and Frank M. Pray as Executors of the estate of Elvira J. Parks, deceased, by Emmett J. McCarthy, their attorney, that there are inventoried assets in the hands of said Executors far in excess of the amount of the claim of the petitioner and that said estate is solvent. It is further stipulated

that there are no uninventoried assets discovered subsequent to expiration of one year from the date of granting of Letters Testamentary.

OTIS F. GLENN,
Attorney for Petitioner.

EMMETT J. McCARTHY,
Attorney for Respondents."

III.

STATUTES INVOLVED.

Section 64, Title 12, U. S. C. A., provides in part as follows:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock * * *."

Section 66, Title 12, U. S. C. A., provides:

> "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), provides in part as follows:

> "All demands against the estate of any testator or intestate shall be divided in classes in manner following, to wit:
>
> "First. Funeral expenses and necessary costs of administration.
>
> * * * * * * * * *

"Sixth. All other debts and demands of whatever kind without regard to quality or dignity, which shall be exhibited to the court *within one year from granting of letters as aforesaid.* (Italics inserted)

"All claims and demands of whatever class *not* exhibited to the court *within one year from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or accounted* for by the executor or administrator; and if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for and shall cause notice to be published in the manner provided by Section 60 of this act, or give such other notice as the court may direct, of a day fixed upon, which shall not be less than three months after the date of such first publication, for the filing and exhibiting of further claims against said decedent, all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory, and the amount remaining due on all claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters shall be paid pro rata out of such subsequently inventoried estate, saving, however, to infants, persons of unsound mind and persons in the employment of the United States or of this state and residing outside of the United States the term of one year after their respective disabilities are removed to exhibit their claims." (As amended by Act approved June 30, 1933) (Italics inserted)

IV.

DECISIONS OF THE CIRCUIT COURT AND APPELLATE COURT OF ILLINOIS.

The Circuit Court of Cook County, Illinois, found that the respondents, Philip W. Huston and Frank M. Pray, as Executors of the estate of Elvira J. Parks, deceased, are the owners and holders of twelve shares of the capital stock of the Austin National Bank of Chicago of the par value of

$100.00 each (R. 6). The court entered judgment allowing the claim of petitioner against uninventoried assets of the estate of Elvira J. Parks, deceased, but disallowing and rejecting said claim as against assets inventoried within one year from the granting of Letters Testamentary (R. 7; opinion and findings not reported.)

The Appellate Court of Illinois affirmed the Circuit Court (R. 17-24; opinion reported 283 Ill. App. 95), and held that the liability created by Section 66, Title 12, U. S. C., constituted an ordinary claim against the estate of the deceased; that Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), barred its enforcement against inventoried assets (R. 23). The court further held that the decision in the case of *Forrest* v. *Jack,* 294 U. S. 158, was applicable and controlling in this case (R. 23).

V.

QUESTIONS PRESENTED.

1. Can the liability for a stock assessment arising under the National Banking Act (Sections 64 and 66, Title 12, U. S. C.) be enforced against the inventoried assets in the possession of the executors of a decedent's estate in process of administration where the liability did not accrue and the claim thereon could not be filed until after the expiration of the one year limitation period for filing claims specified by Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), which provides that claims against estates of decedents filed after one year from the granting of Letters of Administration cannot share in the inventoried assets?

2. Is a claim such as the assessment claim in question within the purview of Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), and hence excluded from assertion against the undistributed inventoried assets of the estate in the hands

of the executors, as provided for by Section 66, Title 12, U. S. C.?

3. Is the Illinois Non-Claim Statute (Section 70, of the Illinois Administration Act; Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), which bars and excludes from participation in the inventoried assets of the estate of a decedent, claims which have not been filed within one year from the granting of Letters Testamentary or Letters of Administration, effective to bar an assessment claim under the National Banking Laws (Sections 64 and 66, Title 12, U. S. C.), which does not arise until after the expiration of the period prescribed by such statute for the filing of claims and where, further, notwithstanding the expiration of such period for filing claims, there has been no final distribution and the estate is still open?

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner believes that the writ of certiorari should be granted because:

(a) The Appellate Court of the First District of the State of Illinois has decided an important question of Federal law dealing with the administration of insolvent national banks which has not been, but which should be, settled by this Honorable Court, involving the construction of Federal statutes, (12 U. S. C., Sections 64 and 66), of utmost importance in the administration of laws applicable to national banks in liquidation; and that the decision of the court is untenable in that it held, by virtue of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), that the inventoried assets of the estate of Elvira J. Parks, deceased, in the hands of the Executors for distribution were relieved from the stock assessment liability imposed by Sections 64 and 66, Title 12, U. S. C., because the period prescribed for filing claims

against the estate had expired prior to the time of the accrual of the said claim, although the estate was still in the process of administration.

The state court based its holding on the decision of this court in *Forrest* v. *Jack,* 294 U. S. 158. It is respectfully submitted that the holding in that case decides only that where the estate has been *extinguished* under state laws, the liability subsequently arising under Sections 64 and 66, Title 12, U. S. C., cannot be enforced. However, in the case at bar the estate is still open and in process of administration, and as shown by the stipulation (R. 26) there are undistributed inventoried assets of the estate in the hands of the Executors, valued far in excess of the assessment claim, which clearly distinguishes it from *Forrest* v. *Jack, supra.* See also *Seabury* v. *Green,* 294 U. S. 165, 169.

(b) The decision and judgment of the Appellate Court of the First District of the State of Illinois ((in holding that the liability imposed by the Federal law (Section 66, Title 12, U. S. C.) which accrued after the time for filing claims against the estate had expired, was barred by the operation of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), even though the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were still in the hands of the Executor)) is in conflict with the principles established by this Honorable Court in *Forrest* v. *Jack,* 294 U. S. 158, 162, 163; *Seabury* v. *Green,* 294 U. S. 165, 168, 169; *Matteson* v. *Dent,* 176 U. S. 521, 524; and decisions of other courts as follows: *Zimmerman* v. *Carpenter,* 84 Fed. 747, 750, 751; *Parker* v. *Robinson,* (C. C. A. 1), 71 Fed. 256, 257; *Rankin* v. *Miller,* 207 Fed. 602, 612; *Drain* v. *Stough,* (C. C. A. 9), 61 Fed. (2d) 668, 669; *Luce* v. *Thompson,* (C. C. A. 8), 36 Fed. (2d) 183, 184, 185; *Gilbertson* v. *McCarthy,* (C. C. A. 8), 32 Fed. (2d) 665, 667, 668; *Mortimer* v. *Potter,* 72 N. E. 817, 818; 213 Ill. 178. Compare *Mann* v. *Kleisdorff,* (C. C. A. 5), 16 Fed. (2d) 997, 998.

WHEREFORE, it is respectfully prayed that this petition for writ of certiorari be granted.

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BRIEF IN SUPPORT OF PETITION.

I.

OPINIONS OF COURTS BELOW.

The findings of fact, conclusions of law, and judgment of the Circuit Court of Cook County, Illinois, are set out in the Record at pages 5, 6 and 7 and are not reported. The opinion of the Appellate Court of the First District of Illinois is found in the Record at pages 20-24, and is reported in 283 Ill. App. 95.

II.

JURISDICTION.

The judgment of the Appellate Court of Illinois was entered December 27, 1935 (R. 17). A timely petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20). Since this case involves less than $1,500.00 (R. 6), an application could not be made to the Illinois Supreme Court for

leave to appeal in accordance with the requirements of the Illinois Practice Act of 1933, (Illinois State Bar Statutes, Ch. 110, Par. 203 (2) 1935) the pertinent portions of which are set out in the Appendix at p. 17. The judgment of the Appellate Court is now a final judgment of the highest court in the State of Illinois in which a decision could be had.

The jurisdiction of this court is invoked to review the cause by writ of certiorari under Section 237 (b) of the Judicial Code, (U. S. C., Title 28, Ch. 9, Sec. 344 (b)), providing for the granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a state in which a decision could be had in a suit in which a right, title or privilege is claimed under a statute of the United States.

The Receiver, (Petitioner herein), claimed the right to collect the assessment from the Executors under Sections 64 and 66, Title 12, U. S. C., and this right was denied by the state court. Hence, a Federal question is involved. *Seabury* v. *Green*, 294 U. S. 165, 168.

III.

STATEMENT OF THE CASE.

A statement of the case is set out in the foregoing petition under the captions "Summary Statement of the Matters Involved", and "The Facts", to which reference is here made.

IV.

SPECIFICATION OF ERRORS.

The Appellate Court erred in holding that the liability created by Sections 64 and 66, Title 12, U. S. C. is not a liability against Philip W. Huston and Frank M. Pray, as Executors, enforceable against the inventoried assets in their hands belonging to the estate of Elvira J. Parks, deceased.

The Appellate Court erred in holding that the undistributed inventoried property and funds of the deceased share-

holder in the hands of the Executors were relieved from the liability imposed by the Federal law, (Sections 64 and 66, Title 12, U. S. C.), by reason of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), requiring claims to be filed against the estate within one year from the granting of letters testamentary, in order to share in the inventoried assets; notwithstanding the estate was still in process of administration, and the assessment claim did not accrue until after the time to file claims had expired.

V.

ARGUMENT.

Section 66, Title 12, U. S. C., expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, *but the property belonging to the estate in their hands is liable*, as would be the deceased, if living.

Forrest v. *Jack*, 294 U. S. 158, 162;
Seabury v. *Green*, 294 U. S. 165, 168;
Matteson v. *Dent*, 176 U. S. 521, 524;
Zimmerman v. *Carpenter*, 84 Fed. 747, 751;
Drain v. *Stough*, (C. C. A. 9), 61 Fed. (2d) 668, 669.

This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate, if not by an earlier transfer.

Forrest v. *Jack*, 294 U. S. 158, 163;
Seabury v. *Green*, 294 U. S. 165, 169.

The state court was of the opinion that the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), barring all claims not filed against the estate within one year, relieved the estate and the inventoried assets in the hands of the Executors from the obligation and liability imposed by Section 66, Title 12, U. S. C., although the liability did not accrue until after the time prescribed for filing claims, and the estate was still in process of administration.

The effect of this decision, upon the facts of the case, is to allow a state Non-Claim Statute to discriminate against the just and convenient enforcement of the liability imposed by the Federal law (Sec. 66, Title 12, U. S. C.) against estates of deceased stockholders which are in process of administration, when there has been no final distribution of the property and the estate is not extinguished. The contingent assessment liability of the estate ripened into absolute liability when the assessment was levied, regardless of the effect of the Non-Claim Statute on claims of ordinary creditors.

If this decision is allowed to stand, the effect of the state Non-Claim Statute has completely thwarted and nullified the enforcement of a liability imposed by Sections 64 and 66, Title 12, U. S. C., which is contrary to settled principles of law as established by this Honorable Court.

> *Forrest* v. *Jack,* 294 U. S. 158, 163;
> *Scabury* v. *Green,* 294 U. S. 165, 169;
> *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283, 284;
>
> *Easton* v. *Iowa,* 188 U. S. 220, 229.

> "The power of the nation within the field of its legitimate exercise overrides in the case of conflict the power of the states."
>
> *Jennings* v. *U. S. F. & G. Co.,* 294 U. S. 216, 226.

Zimmerman v. *Carpenter,* 84 Fed. 747, (cited with approval by this court in *Forrest* v. *Jack, supra*), is conclu-

sive here. There, the time within which a stock assessment claim could be presented against the estate of the deceased, in accordance with state law, expired in December, 1895. The bank failed in November, 1896, the assessment was levied in February, 1897, and became due one month later. It was contended that the claim was barred by the statute of South Dakota fixing the time within which claims could be presented. The court said at page 750:

> "Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of Charles C. Carpenter, deceased, to be presented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute of nonclaim of said state, involves a total misconception of the object, meaning, and effect of sections 5151, 5152, Rev. St. U. S." (Sections 64 and 66, Title 12, U. S. C.) (Parenthesis inserted)

and further at page 751:

> "But congress intended to, and did, provide that the estate of the testator or intestate, *in the hands of an executor or administrator,* should be liable in like manner, and to the same extent, as the testator or intestate would be if living, and competent to act, and hold the stock. By the language of the section last referred to, the death of the testator or intestate does not in any way affect the liability of the estate of the testator or intestate, except, *if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.* On the 23d day of November, 1896, when the Dakota National Bank failed, Frances G. Carpenter, as the executrix of the estate of Charles C. Carpenter, deceased, under the laws of the United States and of South Dakota, was a shareholder therein. To the extent of 100 per cent. of the par value of the stock held by her, the estate of Charles C. Carpenter in her hands on that day was liable; not as if Carpenter was dead, but in the same manner, and to the same extent, as if he was living; the clear object of the statute being to make the estate

liable for a debt arising after the death of a testator or intestate, as well as those arising before. On the 23d day of November, 1896, so much of the estate of Charles C. Carpenter, deceased, which was in the possession of defendant, as executrix of said Carpenter, on that day, stood not as the estate of a deceased person with reference to the liability on said stock, but in the place of Charles C. Carpenter himself, liable in like manner and to the same extent as he (Carpenter) would have been if alive." (Italics inserted)

See also:

Parker v. *Robinson*, (C. C. A. 1), 71 Fed. 256, 257;
Drain v. *Stough*, (C. C. A. 9), 61 Fed. (2d) 668, 669;
Davis v. *Weed*, 7 Fed. Cases 186, 190;
Luce v. *Thompson*, (C. C. A. 8), 36 Fed. (2d) 183, 184, 185;
Gilbertson v. *McCarthy*, (C. C. A. 8), 32 Fed. (2d) 665, 667, 668.
Mortimer v. *Potter*, 72 N. E. 817, 818; 213 Ill. 178.
Compare *Mann* v. *Kleisdorff*, (C. C. A. 5), 16 Fed. (2d) 997, 998.

It is therefore submitted that the effect of the decision in this case is to defeat the enforcement of the stockholder's liability as provided by Sections 64 and 66, Title 12, U. S. C., and deprive the creditors of a national bank in many instances of the protection which Congress undoubtedly intended to be theirs. The Executors held this stock for three years after the death of testatrix and prior to the assessment. The estate received the benefits of the ownership of the stock during this period, and should now share the assessment with the other stockholders.

CONCLUSION.

It is believed that the foregoing discussion and citation of authorities demonstrates that the decision of the court below is erroneous. It is earnestly urged in the interest not only of uniformity in the administration of insolvent

national banks throughout all the states, but also in the interest of settling the law conclusively upon the issues involved, that this Honorable Court entertain a review of this case on writ of certiorari, and it is respectfully submitted, in the light of the reasons indicated, that the petition should be granted.

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APPENDIX.

Jurisdiction of Appellate and Supreme Courts.

Chapter 110, Par. 203 (2), Illinois State Bar Statutes, 1935:

"Appeals shall be taken * * in all cases in which their jurisdiction is invoked pursuant to law except those wherever appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts shall be final, subject, however, to the following exceptions:

"(1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting such appeal.

"(2) In any such case as hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* * * * in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00) * * *."